Section 101(30) of the U.S. Federal Aviation Act of 1958 (72 Stat. 731, 739), like section 1(30) of the Civil Aeronautics Act of 1938 (52 Stat. 973, 980), provides:

> "'Public aircraft' means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes."

This definition, formally adopted by the United States both before and after the Chicago Convention, clearly recognizes that different types of aircraft are instrumentalities of the Government. The definition quoted expressly excludes from the term "public aircraft" any Government-owned aircraft engaged in carrying persons or property for commercial purposes. It was fairly clear at the Chicago Conference in 1944 that any rapid resurgence of international commercial aviation would require, particularly in the case of countries which had suffered heavily during World War II, assistance from governments to enterprises attempting to engage in air operations. Obviously, one way of achieving this government support would be to have a government itself own the commercial enterprise. Government ownership of aircraft engaged in commercial transportation operations was, in fact, anticipated. The probability that some governments would provide economic support for their airlines was one of the reasons the multilateral International Air Transport Agreement was not widely accepted. Thus, many countries felt that airlines that were heavily subsidized by their governments would have a considerable commercial advantage over less subsidized, and unsubsidized, competitors. An objective of the Chicago Convention in this respect was, to the greatest extent practicable, to place international commercial aviation operations in a state of uniformity. Any advantage which might accrue to one particular commercial operator from being able to assert that its aircraft were State aircraft was obviously undesirable. Certain countries, however, were clearly unwilling to renounce all rights which they, as sovereigns, would have with respect to aircraft which they owned, regardless of how those aircraft were used.

Commercial use of government aircraft

subject to test

See, for example, the exchange of notes in 1953 by which the Government of the Kingdom of the Netherlands formally surrendered its right, and the right of its air carrier, KLM, to assert a defense of sovereign immunity from suit in any action or proceeding entered into against that air carrier in any court or other tribunal of the United States arising out of operations under the bilateral air transport Agreement, thus demonstrating the belief of the Netherlands that such a sovereign immunity did exist and could be relinquished only by the sovereign. (U.S. TIAS 2828; 4 UST 1610.)

Both the Paris (1919) and Habana (1928) Conventions provided that all State aircraft other than military, customs, and police aircraft would be treated as private aircraft subject to the terms of the Convention. Lauterpacht, in analyzing these provisions, divided State-owned aircraft into three classes:

State aircraft other than military, customs, and police

(1) Military State aircraft—which must have special authorization to enter the airspace of another State, but which, with such authorization, enjoy the same privileges of exterritoriality customarily accorded to men-of-war unless the entry authorization specifically states otherwise;

(2) Customs, police, and postal aircraft—which may cross foreign frontiers under whatever conditions the States involved may establish, and which do *not* enjoy exterritoriality;

(3) All other State-owned aircraft—which are treated as private aircraft.

I Lauterpacht, *Oppenheim's International Law* (8th ed., 1955) 521.

The Chicago Convention contains much more detailed provisions as to the technical regulation of aircraft operations subject to the Convention than did either the Paris or the Habana Convention. Consequently, inclusion in the Chicago Convention of 1944 of a provision that State-owned aircraft, other than military, customs, and police aircraft were automatically subject to the Convention would have been disturbing not only to the countries that contemplated using Government-owned aircraft for commercial purposes but also to countries that recognized the ever-increasing desirability of using aircraft for governmental purposes other than military, customs, and police work.

At the time of the Chicago Conference, it was common knowledge that Government-owned aircraft, other than military, customs, and police aircraft, would be operated internationally; that many of these aircraft, because they were clearly incapable of hostile action, would be more readily admitted to the airspace of other countries than would military, customs, or police aircraft; but that the States owning these aircraft would not be willing to agree to a provision making all such aircraft automatically subject to all of the provisions of the Convention. As a result, article 3 of the Chicago Convention left such aircraft outside the Convention. Operation of such aircraft is, therefore, subject to bilateral agreements or individual flight permits.

Status of State aircraft

Once it is determined that a specific aircraft is a State aircraft, the exact treatment to be accorded to that aircraft remains to be determined. Article 32 of the Paris Convention of 1919 provided:

> "No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without